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Report of Working Group I (Procurement) on the work of its ninth session

(New York, 24-28 April 2006)

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work at its sixth session (Vienna, 30 August 3 - September 2004) (A/CN.9/568). For the reports of the Working Group on the work of its sixth to eighth sessions, see A/CN.9/568, A/CN.9/575 and A/CN.9/590.

2. At its thirty-eighth session, in 2005, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172).

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its ninth session in New York from 24 to 28 April 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Cameroon, Canada, Chile, China, Colombia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Jordan, Kenya, Lithuania, Madagascar, Mexico, Pakistan, Qatar, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey, Uganda, United States of America and Uruguay.

4. The session was attended by observers from the following States: Bolivia, Cape Verde, Democratic Republic of the Congo, El Salvador, Indonesia, Mali and the Philippines.

5. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Secretariat and the World Bank;

(b) *Intergovernmental organizations*: African Development Bank (AfDB), Economic Community of West African States (ECOWAS), European Commission, European Space Agency (ESA), Inter-American Development Bank (IADB), and World Trade Organization (WTO);

(c) *International non-governmental organizations invited by the Commission*: International Bar Association (IBA), International Law Institute (ILI) and the European Law Students' Association (ELSA).

6. The Working Group elected the following officers:

Chairman: Mr. Stephen R. KARANGIZI (Uganda)

Rapporteur: Mr. Gonzalo SUÁREZ BELTRÁN (Colombia).

7. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.41);

(b) A note concerning the use of electronic communications and publication in the procurement process (A/CN.9/WG.I/WP.42 and Add.1);

(c) A note concerning electronic reverse auctions and abnormally low tenders (A/CN.9/WG.I/WP.43 and Add.1);

(d) A comparative study of framework agreements (A/CN.9/WG.I/WP.44 and Add.1); and

(e) A note concerning suppliers' lists (A/CN.9/WG.I/WP.45 and Add.1).

8. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

9. At its ninth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat A/CN.9/WG.I/WP.42 and Add.1, and A/CN.9/WG.I/WP.43 as a basis for its deliberations. Consideration of the remainder of A/CN.9/WG.I/WP.43, A/CN.9/WG.I/WP.43/Add.1, and A/CN.9/WG.I/WP.44 and A/CN.9/WG.I/45 and their addenda was deferred to the Working Group's next session.

10. On Friday morning, the Secretariat summarized its understanding of the revisions that the Working Group requested to be made to the drafting materials for the Model Law and the Guide, on the use of electronic means of communications in procurement process and on electronic reverse auctions, reflecting the deliberations at the current session. The Working Group also heard a summary of the remaining topics on its agenda (listed in A/60/17, para. 171) and information on the work of other regional and international organizations in the field of public procurement.[1] The Working Group noted that the United Nations Convention against Corruption had recently entered into force and that although the main elements of its provisions addressing procurement were consistent with those of the Model Law, its requirements for domestic review provisions and those addressing conflicts of interest went beyond the current provisions of the Model Law, and might warrant the further attention of the Working Group in due course.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. The use of electronic communications in procurement (A/CN.9/WG.I/WP.42 and Add.1)

1. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents (A/CN.9/WG.I/WP.42, paras. 7-16, and A/CN.9/WG.I/WP.42/Add.1, paras. 1 and 2)

Article 4 bis

11. A number of drafting suggestions were made to the proposed new text of article 4 bis: (i) to use the term "means of communication" instead of "methods of communication", so as to avoid confusion as the term "methods" was already used in the Model Law and the Guide in the context of procurement methods, and so as to conform with the text in the Model Law on Electronic Commerce; (ii) to delete the text in square brackets, except for the cross-reference; (iii) to move an illustrative list of examples of "electronic, optical or comparable means" of communication to the Guide to Enactment and to remove obsolete references; (iv) to delete the words "comparable means" as being undefined but to keep the examples listed in the text of the Model Law; (v) to end the article with "comply with article 4 [ter]"; (vi) to add the word "communicating" after the words "related to" and a reference to "data message"; and (vii) to replace the word "include" in the second pair of square brackets with "such as".

12. The Working Group noted that the adoption of some of the above suggestions would result in the text that would deviate from equivalent provisions in the recently adopted United Nations Convention on Electronic Contracting[2] and other UNCITRAL texts. Nevertheless, it was agreed that making some of the suggested changes would simplify and streamline the text for the specific purposes of the Model Law, and that the Guide would explain that the provision was to the same effect as other UNCITRAL texts.

13. The Working Group agreed with some of the proposed suggestions and decided that the article should be amended as follows:

> **"Article 4 bis. Functional equivalence of all ~~[means][methods]~~ of communicating, publishing, exchanging or storing information or documents**
>
> "Any provision of this Law related to communicating, to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting shall be interpreted to ~~incorporate [any means of such activity, including]~~, include electronic, optical or comparable means [by which such activities take place]. ~~[including, but not limited to,] electronic data interchange (EDI), electronic mail, telegram, telex or telecopy]~~, provided that the means chosen complies with ~~the [provisions of/accessibility standards set out in]~~ article [4 ter]."

14. It was agreed that the Guide would contain an illustrative list of examples of "electronic, optical or comparable" means deleted from the text of the article, which would be updated, especially as regards references to telex and telegram. On the other hand, it was pointed out that which means of communication were obsolete would vary from jurisdiction to jurisdiction, and thus the Guide text should take into account the level of penetration of various types of electronic communications and technologies in the relevant market. It was also agreed that the Guide would state that the provisions of the article were intended to be interpreted broadly so as to encompass any provisions in the Model Law implying physical presence or a paper-based environment.

15. The Working Group noted an inconsistency between the principle of "technological neutrality" in article 4 bis and the proposed article 9 (3) where a reference was made to a specific technology, which would have to be reconsidered in due course.

16. As regards the location of provisions in article 4 bis, some delegates were of the view that they should be included in either article 4 ter or article 9. Another suggestion was to move them to the end of article 2 (Definitions). Concern was expressed at the latter suggestion, since the proposed article 4 bis did not provide for a definition but contained a fundamental principle that would apply throughout the Model Law. It was proposed therefore to retain provisions of article 4 bis as a separate article early in the text of the Model Law, perhaps as article 2 bis. On the other hand, it was noted that such an early placing of the provisions in a separate article would result in substantial renumbering of articles of the Model Law. It was noted that the Working Group should keep in mind the impact that renumbering and other changes in the structure of the Model Law, arising from revisions, would have on jurisdictions that had enacted their procurement laws on the basis of the Model Law. It was suggested in this context that for ease of reference each new provision and all those amended should be accompanied by an appropriate explanatory footnote.

17. Following the Working Group's consideration of articles 4 ter and 9, further amendments were proposed to the text of article 4 bis, its title and location (see paras. 36 and 37 below).

Guide to Enactment text

18. It was suggested that in the Guide to Enactment text addressing the use of electronic communications in the procurement process: references to "communications" should be replaced with "electronic means" when and as appropriate since the notion of communications in the text of the Model Law had a very broad ambit; and some discussions on the role and place of electronic procurement in the context of electronic government should be added.

19. As regards the text under subheading (i), paragraph 2, it was pointed out that: some parts of the text referring to administration of contracts and to compliance with rules and policies should be deleted as those issues were not encompassed by the scope of the Model Law (see however paras. 81 to 86 below); the French translation of the term "electronic procurement", referring to "procédures dématerialisées" rather than the more literal translation of the English text, "marchés electroniques", was rather broader in scope, and therefore the texts in both

language versions should be reviewed and conformed; and paragraphs 3 and 4 should be aligned with article 4 ter.

20. As regards the text under subheading (ii), paragraph 7, it was agreed that the word "universally" before the word "legible" should be deleted. The initial concern was expressed that an immediately following reference to "unaltered over time" might be interpreted as imposing higher requirements on electronic communications than on paper communications and therefore the Guide should elaborate on the time frame intended. The Working Group's understanding was however that no detailed elaboration on that point would be necessary, as the text simply listed qualitative requirements applicable to both electronic and paper communications, such as that communications should not degenerate over time.

21. As regards the text under subheading (ii), paragraph 14, it was suggested that more detail should be added to the first sentence, so as to spell out situations in which the use of electronic means under the Model Law would be required, such as in the case of electronic reverse auctions or when a procuring entity specifically requires such use. The text would also provide more guidance on the impact of varying levels of use of electronic commerce in enacting States.

22. It was suggested that, consistent with the current drafting of the Guide, no subheadings in the Guide would be required.

2. Accessibility standards (A/CN.9/WG.I/WP.42, paras. 17-19, and A/CN.9/WG.I/WP.42/Add.1, para. 3)

Article 4 ter

23. The Working Group recalled that the proposed text for article 4 ter contained four elements, addressing the means of communication (which term includes publishing, exchanging or storing information or documents, holding meetings, and submission and opening of tenders) from the following standpoints:

(a) Non-discrimination;

(b) Not posing an obstacle to the procurement process;

(c) General availability; and

(d) General compatibility with other means of communications in use.

24. Various suggestions were made as regards which of those elements should be retained in the proposed article 4 ter.

25. It was observed that the term "accessibility standards" in the title of the proposed article might involve some unintended connotations, since the notion of "accessibility" had become associated with civil rights of access as a general notion regarding certain minority groups. Accordingly, an alternative term, "availability", was proposed. It was noted that the term "accessibility" was used in the current article 5 of the Model Law (referring to the public accessibility of legal texts related to procurement), and that it denoted a broader concept than "availability" (which was more fact-based). On the other hand, it was noted that requiring the procuring entity to address the notion of "accessibility" in this regard might involve the procuring entity in assuming the costs of ensuring such accessibility, which would be onerous and might exceed the aims of the Working Group. Accordingly, the

Working Group decided that the term "availability" should be used so as to avoid unintended connotations.

26. It was observed that the main issue to be addressed in this article was non-discrimination in communications, and that this notion already existed in article 9 (3) of the current text of the Model Law. It was also noted that the notions of "availability" and "compatibility" could be viewed as either aspects of non-discrimination, or related but distinct concepts.

27. It was further recalled that the 2004 European Union procurement directives included a requirement of availability, but from the perspective that the means of communication in the procurement process should not restrict access to the procurement. It was noted that the proposed text 4 ter addressing non-discrimination could be viewed as encompassing the requirements set out in the directives, as the proposed text included a reference that the means of communication chosen should not limit competition.

28. Accordingly, it was suggested that the text of article 4 ter should comprise the first two paragraphs proposed, addressing non-discrimination alone. Nonetheless, the Guide to Enactment should expand on the concept of non-discrimination, to clarify that the means of communication chosen should not pose an obstacle to the procurement process and should address general availability.

29. It was also observed that the question of discrimination in the means of communication chosen (or, indeed, the method of procurement selected), was one that had been considered when the current Model Law was being drafted, and that it was also possible to discriminate in the application of any such decisions. These possibilities had been recognized in the drafting of article 9 (3) of the current text of the Model Law.

30. The view, however, prevailed that the elements contained in (a), (b) and (d) of paragraph 23 above, should be deleted. As regards (b), not posing an obstacle to the procurement process, it was observed that the provision could be viewed as encompassing all the objectives in the preamble to the Model Law, and would enable the flexibility that would be desirable in selecting the means of communication and related matters. On the other hand, it was noted that a decision on what was an "obstacle" to the procurement process was subjective and therefore the provision could be abused. Nevertheless, the understanding in the Working Group was that the Guide would clarify that the means of communication chosen should not pose an obstacle to the procurement process, as otherwise they would jeopardize the promotion of the Model Law's objectives of maximizing economy and efficiency in procurement, as stated in its preamble paragraph (a).

31. As regards the element in paragraph (a) of paragraph 23 above, it was observed that the notion of non-discrimination existed in some provisions of the current text of the Model Law, such as article 9 (3), and in positive terms of fair and equitable treatment of suppliers and contractors in the preamble paragraph (d). Differing views were expressed on whether a general principle of non-discrimination should be included in the Model Law. The prevailing view was that it should not as it would exceed the mandate of the Working Group, which is to review the Model Law to ensure functional equivalence and allow for the use of new methods of procurement. It was also mentioned that non-discrimination with respect to both means of communication and in general was recognized as an important

principle. Therefore, the objective of providing for the fair and equitable treatment of all suppliers and contractors reflected in the preamble should be reflected in the Model Law through specific norms as and when appropriate.

32. The Working Group noted that the non-discrimination provisions of article 9 (3), intended to address risks of discrimination in the context of closed communication systems, would become obsolete and in fact contradict the proposed revisions, in particular those in the proposed article 9 that would give the procuring entity the ability to select the means of communication.

33. It was further observed that provisions on non-discrimination might have an inadvertent and negative effect on the use of electronic means of communication in public procurement: procuring entities might be reluctant to have recourse to electronic means because of the fear that some suppliers or contractors who felt aggrieved by the choice of the means of communication would seek a review of the decision involved, and such a right of review might itself become an obstacle to the procurement process. It was further noted that any possible discrimination as well as challenges and integrity of communication were concerns that should be considered when the procurement entity assessed the potential benefits of electronic procurement. The risk could arise that merely because a small number of suppliers did not have access to the relevant technologies required, electronic procurement would not be introduced and its benefits would not take effect.

34. Introducing a qualifier to the notion of discrimination, for example "unreasonable", "manifest", "obvious" or "deliberate", as proposed, might not alleviate such a risk completely and might also introduce an element of subjectivity. In addition, such a qualifier could introduce new concepts of discrimination bringing inconsistency with other existing provisions on discrimination in the Model Law. Nonetheless, it was agreed that the Guide to Enactment should address the notion of discrimination and explain with examples how it might arise in practice. (See also para. 60 below).

35. Noting that discrimination might arise only when the use of certain means of communications could not be objectively justified, the Working Group decided that the notions of "general availability" contained in the last paragraph of the proposed article 4 ter could be viewed as a means to provide for non-discrimination. Accordingly, the Working Group decided that the text of article 4 ter should comprise the first and the last paragraphs proposed and should read as follows:

> "The procuring entity shall ensure that the means of communicating, publishing, exchanging or storing information or documents, of holding meetings, and of submitting and opening of tenders are readily capable of being utilized with those in general use among suppliers or contractors."

36. Subsequently, it was agreed that this wording should be reflected in the provisions of article 4 bis as follows (with the deletion of article 4 ter in its entirety):

"Any provision of this Law related to communicating, to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting shall be interpreted to include electronic, optical or comparable means [by which such activities take place], provided that the means chosen are readily capable of being utilized with those in general use among suppliers or contractors."

37. As regards the location of the amended consolidated provisions, it was agreed that they, together with some provisions of the proposed article 9 (see paras. 39 and 40 below), would comprise a separate article that would set out a fundamental principle relating to the use of communications (in its broadest sense) in the procurement process, and therefore should be placed early in the Model Law, perhaps after article 5 (to follow the chronology of the procurement process, that is, before any identification of suppliers or contractors). A new title would reflect a new expanded scope of the consolidated provisions and therefore references to "accessibility" or "availability" standards and to "functional equivalence" would have to be amended accordingly.

38. As regards the proposed Guide to Enactment text, the Working Group agreed that, apart from what was stated in paragraphs 30 and 34 above, the Guide would reflect the Working Group's decision on the text of articles 4 bis, 4 ter and 9 and: (i) expand on the notion of general availability of means of communication (for example, from the perspective that procuring entities should take account of the level of penetration of electronic communications and technologies in the relevant market when making their selection of the means of communication for the procurement concerned as well as costs of such means); (ii) highlight that recourse to which means of communication was objectively justifiable would vary from jurisdiction to jurisdiction and from procurement to procurement; (iii) address interoperability and compatibility issues, references to which had been deleted from the last subparagraph of the proposed article 4 ter; and (iv) advise that stricter requirements might apply (for example, under international treaties or imposed by multilateral development banks).

3. Form of communications (A/CN.9/WG.I/WP.42, paras. 20-28, and A/CN.9/WG.I/WP.42/Add.1, paras. 4 and 5)

39. In the context of the consideration of article 9, it was decided that article 4 bis as amended (see paras. 36 and 37 above) should be merged with draft article 9 (1) requiring the procuring entity to set out its chosen means of communication when first soliciting participation in the procurement process, and with draft article 9 (4) requiring the procurement regulations to make provision addressing the authenticity, integrity, accessibility and confidentiality of communications.

Proposed article 5 bis

40. The Working Group decided to consider the following text at its next session:

"Article 5 bis [title to be considered for the tenth session]

(1) Any provision of this Law related to communicating[, to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting,] shall be interpreted to include electronic, optical or comparable means [by which such activities take place], provided that the means chosen are readily capable of being used with those in general [or common] use among suppliers or contractors.

(2) Documents, notifications, decisions and other communications ~~[referred to in this Law]~~ between suppliers or contractors and the procuring entity shall be provided, submitted or effected by the means of communication specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, provided that the means specified are capable of being used as set out in the preceding paragraph.

(3) The [procurement regulations or the procuring entity] [shall or may] establish measures to ensure the authenticity, integrity, accessibility and confidentiality of communications.

[(4) The provisions of paragraph 1 of this article shall apply equally to any provision of this Law related to writing, to publication of information, to the submission of tenders in a sealed envelope, to the opening of tenders, to a record or to a meeting.]"

41. The Working Group noted that the first paragraph of the article above addressed not only communications, but also writing, publication of information, submission of tenders in a sealed envelope, opening of tenders, records and meetings. However, the second and third paragraphs addressed communications alone. The Working Group agreed to consider at a subsequent session whether these other items should be included in the first paragraph, alternatively as a separate fourth paragraph in this draft article, or elsewhere in the text, and that the bracketed text in paragraphs (1) and (4) would reflect that outstanding issue.

42. As regards paragraph (2) of the article above, it was agreed that the restriction of "documents, notifications, decisions and other communications" in the previous version of the text to those "referred to in this Law" should be deleted, so as to refer to any communications generated in the procurement process, and the same change should be made in the remainder of the proposed article 9 (see para. 44 below).

43. As regards paragraph (3) of the article above, the Working Group noted that the obligations in the remainder of the article fell upon the procuring entity. The Working Group therefore agreed to consider whether the procuring entity, rather than the enacting State by means of regulations, should address the issues of authenticity, integrity, accessibility and confidentiality of communications set out in that paragraph, and whether either the procuring entity or the enacting State should be given the option or should be required to do so. The bracketed text in the proposed text would reflect that outstanding issue. It was also agreed that the Guide to Enactment should discuss in detail the issues raised by the authenticity, integrity, accessibility and confidentiality of communications.

Article 9

44. As regards the remainder of the previously proposed article 9, addressing the form of communications, it was suggested that the article should address the requirement that communications should contain a record of their content. Accordingly, the Working Group agreed to continue its deliberations on a revised article 9 based on the following text:

> **"Article 9. Form of communications**
>
> (1) Subject to other provisions of this Law, documents, notifications, decisions and other communications ~~[referred to in this Law]~~ to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication and is accessible so as to be usable for subsequent reference.
>
> (2) Communications between suppliers or contractors and the procuring entity referred to in articles 7 (4) and (6), 12 (3), 31 (2)(a), 32 (1)(d), 34 (1), 36 (1), 37 (3), 44(b) to (f) and 47 (1) [update for revisions to Model Law] may be made by a means of communication that does not provide a record of the ~~confirmation~~ content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the content of the communication and is accessible so as to be usable for subsequent reference."

45. It was agreed that the wording of the previously proposed article would be changed from an obligation to provide a "record of the confirmation" to one to provide a "record of the content of the communication" so as to ensure that the content and the fact of the communication should be recorded.

Guide to Enactment text

46. The Working Group decided not to consider the text for the Guide that would have to be changed in the light of the discussions at the current session.

4. Legal value of procurement contracts concluded electronically (A/CN.9/WG.I/WP.42, paras. 29-30, and A/CN.9/WG.I/WP.42/Add.1, para. 6)

47. The Working Group requested that the reference to the "execution" of a contract in the final sentence of proposed paragraph (1) bis should be changed to the "conclusion" of a contract, so as to avoid any unintended technical connotations from the use of the term "execution" that might arise in individual jurisdictions.

48. As regards paragraphs (1) bis and quater, it was agreed that the references referring to the need for enacting States to address the adequacy of electronic commerce laws should use the verb "may" rather than "will", so as to confer flexibility and to allow enacting States to take account of differing factual circumstances.

5. Requirement to maintain a record of the procurement proceedings (A/CN.9/WG.I/WP.42, paras. 31-32, and A/CN.9/WG.I/WP.42/Add.1, para. 7)

49. It was observed that the Guide to Enactment should explain the ambit of proposed paragraph (b) bis, so that the record should set out any particular computer software or other criteria used for the means of communication chosen by the procuring entity.

50. It was noted that the Guide to Enactment text should be conformed to the proposed article 5 bis, and that the requirement that the procuring entity select a means of storage of information in the record that would remain accessible "until the time for review under article 52 of the Model Law [had] elapsed" should be expanded to include any different period of time that the law in a particular system may apply to document retention systems.

51. It was also agreed that the obligation to "ensure that record retention systems are fully compatible (or interoperable)" should be deleted from the text. The overriding consideration was that the information in the record could be made available to third parties entitled to receive it, and the accessibility requirements set out in the text would adequately address the issue.

6. Electronic submission of tenders, proposals and quotations (A/CN.9/WG.I/WP.42, paras. 33-34, and A/CN.9/WG.I/WP.42/Add.1, para. 8)

52. It was observed that there were two significant notions regarding the electronic submission of tenders: the need to foster trust and confidence in electronic systems, and to identify and work towards the objectives of the proposed amendments. Transferring the safeguards of the traditional means of submission of tenders to the electronic environment would be critical. The introduction of any new system would raise new risks, and measures to alleviate them, particularly in the transitional period, should be adopted.

53. The Working Group noted that it would be important for the procuring entity's selection of the means of submission of tenders to be set out in the solicitation documents. Although the procuring entity would have to comply with the requirements of proposed article 5 bis when making its selection, it was considered that an express reference to those requirements would not be necessary in article 30 (5)(a) of the Model Law. Accordingly, the proviso in the text referring to the proposed article 5 bis should be deleted.

54. The Working Group also considered the proposed deletions from the original text of article 30 (5)(a) of the Model Law, referring to the requirements for tenders to be submitted "in writing, signed and in a sealed envelope". It was observed that these requirements were critical safeguards for the submission of tenders.

55. The Working Group also heard that in many jurisdictions, the overwhelming majority of tenders continued to be submitted in traditional, paper-based format, and that the above requirements remained relevant.

56. The Working Group heard that some jurisdictions had sought to avoid the technical consequences of requiring an electronic document to be signed by referring to such documents being capable of authentication. If the principle of technical neutrality conflicted with the fundamental principles of the Model Law itself, such as the requirement for tenders to be in writing, signed and in a sealed

envelope, the latter should prevail. Accordingly, although the requirements implied a paper-based environment, they should be retained in the text of article 30 (5)(a). It was also noted that the provisions of proposed article 5 bis would allow these safeguards to be translated into the electronic environment using the functional equivalence principle.

57. It was also noted that the Guide to Enactment on this question would need to address the practical issues that arise in permitting the electronic submission of tenders, including the equivalent safeguards to writing, signature and a sealed envelope (such as an encrypted electronic tender to equate to a one in a sealed envelope). In addition, a virus could delete an electronic tender when it was opened, so that the tender would no longer exist. Accordingly, the Guide could recommend (as some systems do) the use of virus scanning software to identify any potential risks of this type, which again would enhance both confidence and transparency in the electronic environment.

58. The Working Group considered how to address the possibility that an electronic system for the receipt of tenders might fail. It was noted that there should be no liability upon the procuring entity should a tender not be received—the risk of submission of a tender was the supplier's, and the procuring entity was liable only to provide a receipt for the submission. However, it was considered that steps could be taken to alleviate the risks involved, for example by allowing for the submission of duplicate tenders in a different format as a safeguard against system failure (which some systems already permitted). Although it was noted that suppliers could seek to alter the terms of their tenders when submitting a duplicate, and that instances of this practice had been observed, it was considered that the benefits of allowing back-up submissions would exceed the potential disadvantages.

59. Furthermore, the Working Group heard that in many countries, the practice was not to require one exclusive means of submission of tenders. In such cases, a mixed system operated in which some suppliers submitted tenders in traditional format, and others electronically. (Further variants of a mixed system would include the use of different methods of communication during the procurement process, and the option to suppliers to submit some parts of their tenders, such as samples or, technical drawings or legal certificates, in physical or paper-based format). It was commented that allowing a mixed system would not only promote confidence, but would also lead to enhanced levels of participation. Accordingly, it was decided that the procuring entity should be able to select either traditional, paper-based means of submission of tenders (and communications generally), or electronic means, or both, and that the text of the Model Law should expressly allow more than one means to be selected.

60. Although the Working Group heard that allowing the suppliers themselves to select the means of submission might enhance participation, it was agreed that the selection should be left up to the procuring entity. The supplier might have recourse if the procuring entity acted in a discriminatory way in making the selection, but would otherwise be required to comply with the means of submission selected by the procuring entity, as set out in the solicitation documents. In connection with this issue, it was observed that the non-discrimination provision in the text of the current article 9 (3) of the Model Law, which sought to prevent discrimination in the application of the selection of the means of communication, remained pertinent even in the light of the proposed article 5 bis of the Model Law. Accordingly, the

Working Group decided to consider at its next session whether an express non-discrimination provision should be retained and, if so, its location.

61. In this regard, it was also noted that the Guide to Enactment should stress that the use of mixed systems would be most appropriate during the transitional period after the introduction of electronic means of communications in procurement, and that the use of only electronic means would be promoted where appropriate in the longer term.

62. It was further observed that the proposed text of article 30 (5)(a) referred to the "form", whereas the proposed article 5 bis referred to the "means", of submission of tenders. It was noted that the two provisions should be consistent in this regard, as well as in references to the requirements of tenders to be in a sealed envelope, and that if the form were specified as being "in writing, signed and in a sealed envelope", the reference to the manner of their submission should perhaps be to the "means" of their submission, so as to achieve the desired consistency.

63. Accordingly, the Working Group decided that at its next session it would consider the following text for article 30(5)(a): "A tender shall be submitted [by the means specified in the solicitation documents, and shall be submitted] in writing, signed and in a sealed envelope".

7. Electronic opening of tenders (A/CN.9/WG.I/WP.42, paras. 35-37, and A/CN.9/WG.I/WP.42/Add.1, para. 9)

64. It was observed that the use of a sealed envelope in the submission of tenders discussed in the preceding section was also an essential feature of the opening of tenders, because the existence of the seal until the time of opening was a critical element of confidence in the process.

65. As regards the proposed text for article 33 (4) of the Model Law, it was noted that the requirement for suppliers to be able to follow the opening of tenders "simultaneously" or "instantaneously" should be changed to "contemporaneously", which would require the procuring entity to open the electronic tenders and upload them onto the relevant website immediately thereafter, a procedure equivalent to and not more onerous than the traditional public opening of tenders. It was also suggested that the final part of the proposed text should read "if [suppliers] are capable of following the opening of the tenders contemporaneously through the electronic, optical or comparable means of communication used by the procuring entity".

8. Electronic publication of procurement-related information (A/CN.9/WG.I/WP.42, paras. 38-45, and A/CN.9/WG.I/WP.42/Add.1, para. 10)

Article 5

66. It was stressed that the article was important and used by multilateral development banks as a benchmark to assess a level of transparency in procurement regulation in various countries. It was suggested that provisions in article 5 should remain as clear as possible and not be overloaded with extensive requirements.

67. The prevailing view was that the current scope of the article should be maintained. It was observed that while the objective of transparency was important, it should not be achieved at the expense of other important considerations, such as costs and other burdens on procuring entities.

68. The desirability of including a reference to "all judicial decisions on the application thereof" in the revised article was questioned. Concerns were expressed that in some jurisdictions, it would be impossible to comply with the requirement to make this information promptly accessible to the public and systematically maintain. Some delegations were of the view that the imposition of this requirement should be restricted to judicial decisions with precedent value and "of general application".

69. Questions were raised about the meaning of the phrase "systematic maintenance". It was suggested that the phrase sought to capture the requirement to update and that it could be onerous with respect to certain types of information. The suggestion was made that such a requirement should apply only to the procurement law and procurement regulations, while a less stringent regime should apply, for example, to administrative rulings.

70. The point was also made that a difference should be drawn between the requirement to make legal texts accessible and the requirement to publish them. While the former could in most cases be easily complied with in practice as regards all legal texts referred to in the article, the latter would pose practical problems of compliance, especially if it applied to all judicial decisions and administrative rulings. It was stressed, on the other hand, that the requirement to make legal texts accessible could also be burdensome in practice as, for example, judicial decisions and administrative rulings might be available but not necessarily easily accessible.

71. Some support was expressed for splitting article 5 into two paragraphs: the first paragraph dealing with legal texts that had to be published (law, procurement regulations and directives of general application); and the second paragraph dealing with significant important judicial decisions and administrative rulings that should be maintained on an ongoing basis. It was suggested that different requirements should apply to these two categories of information. As regards the first category of legal texts, the requirements would remain as they were in the current article 5, in particular the notion of timeliness was stressed to be important and therefore the word "promptly" should be kept in the article. As regards the second category, the requirement to "systematically maintain" would be replaced with the requirement "to update on a regular basis if need be".

72. The prevailing view was that the Secretariat should take into account this approach when preparing a revised text of article 5 and that further details should be included in the Guide, in particular issues that would be desirable to regulate in procurement regulations, such as media and manner of publication.

73. Some support was expressed for the retention of the first proposed addition in article 5. The reference to "other information" in it was proposed to be restricted by the addition at the end of the words "regarding procurement policies". On the other hand, it was questioned whether the suggested wording would be appropriate in the Model Law, as an enacting State would in any case have options to add provisions to those existing in the Model Law, and whether it would not already be covered by the general objective of transparency.

74. The prevailing view was that all proposed possible additions in square brackets should be reflected only in the Guide. It was suggested that the second proposal should specify, for the benefits of enacting States, requirements regarding publication found in the Model Law. Reference to systematic maintenance in this context should be reconsidered as being onerous, and its benefits illusionary.

Provisions on "forthcoming procurement opportunities"

75. Divergent views were expressed as regards the desirability of including these provisions in the Model Law. On the one hand, it was stated that this approach would be desirable as provisions were conducive to transparency in public procurement and promoting competition. In addition, it was pointed out that this would align the Model Law in the respective part with the WTO Agreement on Government Procurement.

76. Suggestions were made that the proposed provisions should be amended as follows so that to clearly state that they would not constitute calls for tenders: "as promptly as possible after beginning of a fiscal year procuring entities may publish information of the expected procurement opportunities for the following [the enacting State specifies the period], and this information shall not constitute the solicitation documents or parts thereof". Another suggestion was to replace the verb "may" with the word "shall" or "should". Some delegates however expressed the view that if the provisions were to be included in the Model Law, they should remain enabling rather than prescriptive. The suggestion was made that they might be included in article 5.

77. On the other hand, some delegates were of the view that the proposed provisions would be more appropriately located in the Guide. They were against making the provisions prescriptive as they would in such case impose burdensome requirements on procuring entities in the sense that they could be interpreted as proposing a new standard or step for the procuring entity with respect to publication of information prior to solicitation.

78. The suggestion was made that in the consideration of this issue, the Working Group should assess whether the practice of publication of this type of information would be consistent with objectives of the Model Law, and if so whether there would be the need for a specific enabling provision in the Model Law to promote the practice.

Guide to Enactment text

79. It was suggested that the sentence beginning with the words "Incentives may be provided" in paragraph 2 of section (a), the second sentence of paragraph 4 of section (a), and paragraph 2 of section (b) should be deleted. In the sentence beginning with "Although the Model Law requires" in paragraph 2 of section (a), it was suggested to replace the last portion of the sentence beginning with the words "and might operate" with the following phrase "and enacting States should consider the cost of additional publication having regard of the benefits to recipients".

9. Outstanding issues (A/CN.9/WG.I/WP.42, paras. 36-48)

80. As regards the general approach to redrafting the Model Law, the point was made that amendments should be kept to the minimum and be drafted in a flexible manner to accommodate varying conditions in different countries. It was also noted that the revised Model Law should be as user-friendly as possible.

81. As regards whether scope of the Model Law and the Guide should be expanded to address procurement planning and contract administration, it was pointed out that the procurement in fact covered these stages, and involved various public agencies. However, it was observed that some of these stages did not fall within the purview of procurement legislation, but rather budgetary legislation (procurement planning) and contract law (contract administration). Nevertheless, it was pointed out that these stages were integral parts of the entire procurement process with the result that deficiencies at one stage would have a negative impact on other stages and the overall procurement process, with a risk that the Model Law's objectives could be compromised. Therefore, it was stressed that the proper regulation of all the stages leading and following the selection of a contractor, the current scope of the Model Law, was paramount.

82. Accordingly, suggestions were made that, if not by establishing general principles in the Model Law, the Guide should address inter alia best practice in procurement planning and contract administration so as to cover the entire procurement process. On the other hand, it was noted that it might be more feasible in the expanded Model Law and/or the Guide to deal with the issues of procurement planning alone, as regulation of contract administration was a considerably more complex undertaking. The Working Group recalled in this respect the UNCITRAL Legislative Guide on Drawing Up International Contracts for the Construction of Industrial Works, which dealt with pre-contract issues as well as with the specific provisions of a works contract. It was pointed out that in some jurisdictions the contract administration stage was regulated by separate legislation.

83. Specifically in the context of procurement planning, it was pointed out that the Working Group had already touched upon one of the issues related to the procurement planning stage, the publication of information on forthcoming procurement opportunities. Support was expressed that the Guide should encourage the publication of this information in enacting States as conducive to proper procurement management, good governance and transparency. Caution was expressed as regards the inclusion in the Model Law of anything beyond general principles that should govern procurement planning since otherwise the flexibility necessary in that stage would be eliminated. Suggestion was made that the Guide or other tools that could be developed to assist States with enacting and implementing the Model Law was an appropriate place to discuss details about procurement planning and some good practices to be encouraged. Nevertheless, it was pointed out that there might be practical difficulties in finding the relevant information and solutions that would accommodate all various local conditions.

84. Specifically in the context of contract administration, it was suggested that the Model Law or the Guide should alert enacting States to problems that might arise (i) on the one hand, at the stage of the selection of a contractor, which might have negative impact on contract administration, especially as regards the ultimate price that State would have to pay for goods, works or services provided, and, (ii) on the

other hand, at the contract administration stage, where variations might significantly increase the final price, undermine the integrity of the procurement process and negatively affect the legitimate interests of the parties. It was suggested that the Guide, where appropriate and possible, should provide guidance to enacting States on how to prevent and deal with these possible issues.

85. As regards the nature of the Guide, suggestions were made that the Guide should not only be addressed to legislators but should also be a more general guide to the implementation and use of the Model Law, addressed to a broader audience. It was agreed that drafting regulations as part of such a guide would not be feasible as they would require even a higher level of specificity than that required for the Model Law and would need to reflect divergent systems. The revised Guide could elaborate on issues that would be important to reflect in procurement regulations. The view was expressed that model clauses could also be provided in the Guide, which could be especially valuable, if they drew from practical experience of various stakeholders, including development banks. A preference was expressed for using the verb "may", not "will", in the Guide to Enactment, when referring to general legislative issues to be addressed by enacting States.

86. The Working Group decided to take up these issues in due course, at which stage the Secretariat might be requested to undertake a study that would enumerate problems commonly encountered at procurement planning and contract administration stages and analyse ways of dealing with them in various domestic, regional and international regulations.

B. Draft provisions to enable the use of electronic reverse auctions under the Model Law (A/CN.9/WG.I/WP.43)

1. General remarks

87. It was pointed out that in drafting any provisions on electronic reverse auctions (ERAs) in the Model Law and the Guide, conditions in and interests of countries that would primarily benefit from the Model Law should be kept in mind. It was pointed out that the Model Law had promoted so far traditional open tendering as a "gold standard", whose fundamental principles included prohibition of negotiations and a single opportunity for a supplier to submit its best tender, which were contradicted by the inherent features of ERAs. Acknowledging and regulating ERAs in the Model Law could mean deviation from these fundamental principles and dilution of the "gold standard" of open tendering.

88. The Working Group noted developments in the use and regulation of ERAs at national and regional levels, as well as the multilateral development banks' stance in that respect. In reiterating that ERAs posed a number of new risks and might increase those present in the traditional sealed envelope environment, the general view was that the Working Group should consider all problems that ERAs raised so as properly to mitigate them through regulation.

89. It was acknowledged that because of the novelty of ERAs, it would be difficult to set out best practice in their use. Therefore, the view was expressed that the Model Law's provisions on ERAs should be drafted as broadly as possible to allow evolution of the practice with ERAs. At the same time, it was stated, it would be

important to establish the essential legal framework for their operation, based on general procurement principles and principles specific to the operation of ERAs. Anonymity of bidders and clear specifications established and made known to suppliers at the outset of procurement were named as such important considerations. The importance of preserving the anonymity of bidders was also highlighted in the broader context of competition and fair dealing.

90. Experience with ERAs in at least one jurisdiction, it was said, indicated that they might be a costly tool for procurement of demands for only one procuring entity as third-party contractors were hired. Therefore, consolidated purchases were encouraged.

91. The initial preference was that the provisions should be drafted in such a way as to allow the price to be the only award criteria when ERAs were used. Allowing criteria other than price would open the possibilities of abuse as a subjective element could be introduced into the process when trying to quantify these criteria. The view was expressed that establishing the lowest price below which tender would not be accepted could be an important safeguard for a proper management of ERAs and against abnormally low tenders.

92. The preference was also expressed for standard goods and commodities to be subject to ERAs. The point was made that even standard services (for example, cleaning services) could have qualitative elements and therefore procurement through ERAs could compromise quality. On the other hand, it was stated that it would not be desirable to limit ERAs to any particular type of procurement as at this stage it would be difficult to predict how the tool would evolve. As experience in some countries suggested, services were capable of being procured through ERAs even when quality mattered with a two phase approach, the first phase involving the assessment of quality aspects.

93. A number of objections were raised to providing exclusively for Model 1 ERAs as they presupposed a fully automated process, which especially at a transitional stage in development, could not be achieved without the risk of excluding a substantial number of suppliers.

94. It was agreed that ERAs should not be restricted to a stand-alone procurement method, to avoid prejudicing their evolution. ERAs should also be allowed as an optional phase in some procurement methods.

2. Conditions for use of electronic reverse auctions (A/CN.9/WG.I/WP.43, paras. 9-37)

95. The following text was proposed to be included in the end of chapter III "Tendering proceedings", as a new section IV "Electronic reverse auctions", where all ERA related provisions, including the proposed text for articles 47 bis and ter, should be consolidated:

"Article [36 bis]. Conditions for use of electronic reverse auctions

"A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with article[s 47 bis and ter] in the following circumstances:

(a) Where it is feasible for the procuring entity to formulate detailed and precise specifications for the goods, construction and services;

(b) Where there is a competitive market of suppliers or contractors that are anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured;

(c) Where it concerns

(i) commonly used goods, the characteristics of which are generally available on the market; or

(ii) commonly used services or constructions, the characteristics of which are generally available on the market and provided that the services or constructions are of a simple nature; and

(d) the price is the only criterion to be used in determining the successful bid;

or (e) [option for the legislator:]the price and other criteria that can be expressed in figures or transformed into monetary units and can be evaluated automatically are to be used in determining the successful bid.]"

96. Support was expressed for the suggested wording, which, it was observed, represented a compromise solution, drafted in a sufficiently broad and flexible manner to allow evolution of ERAs within a number of parameters. There was agreement in the Working Group that all provisions in the proposed article 36 bis should be taken as a package, so as to preserve the effect of all safeguards contained therein.

97. An observation was, on the other hand, that the proposed text favoured price considerations at the expense of quality and that the approach should be reconsidered. In response, it was observed that that situation was inherent in ERAs and thus in procurement where quality was more important than or equal to price, other procurement methods might be more suitable. Concerns were also expressed on whether the article provided sufficient assurances regarding responsiveness. The point was made, however, that the issue of responsiveness was addressed in article 47 bis.

98. A number of amendments were proposed with respect to the text: throughout the text, to use consistently "construction or services" in square brackets (consistent with the Model Law's terminology); in paragraph (a), to remove the reference to the procuring entity; in paragraph (c), to delete "the characteristics of"; in subparagraph (c)(ii), to put in brackets the phrase "generally available on the market"; and in the optional paragraph (e), to insert the word "only" before the phrase "other criteria", to consider the appropriateness and location of the phrase "option for the legislator", to include alternative wording to "evaluated automatically", such as "evaluated in automatic processes", to replace the term "bid" with the term "tender" and to refer to paragraph (d) and optional paragraph (e) as alternative text for paragraph (d).

99. With reference to paragraph (a), it was also observed that the paragraph might be redundant in the light of article 27 (d) of the Model Law, and the Working Group would revisit the question. With reference to paragraph (e), it was also questioned whether the paragraph should stay in the Model Law or be moved to the Guide.

100. It was suggested that the Guide should explain that construction or services would not normally fulfil conditions for ERAs, unless they were of a highly simple nature. Strong support was expressed for that suggestion and reference in this regard was made to paragraph 35 of A/CN.9/WG.I/WP.43, in particular its provisions on commodities, that, it was said, should remain as the text for the Guide accompanying the proposed article 36 bis. It was also pointed out that, while the proposed article envisaged criteria other than price for ERAs, the Guide should alert to potential dangers if such other criteria were included. Another proposal was for the Guide to clarify that the term "qualified" used in subparagraph (b) should not mean that pre-qualification would necessarily be involved in ERAs.

101. Among other considerations to be reflected in the Guide suggested were the need to ensure the anonymity of bidders (pointing out that the requirement that reverse auctions should therefore be only in electronic form); that ERAs would be a single and final round before a winner was selected to prevent abuses; the winning price would figure in the contract, including in the case of framework agreements; opening and closing of the auctions would be clearly specified in advance; and on the importance of a sufficient number of participating suppliers to ensure competition. The Working Group heard that the type of non-price criteria contemplated included delivery times and technical considerations. The Working Group agreed that no criteria other than those in (d) and optional (e) should be auctioned.

102. In addition, to preserve the benefits of ERAs as an efficient tool and to alleviate difficulties with drafting precise specifications, it was suggested that the Guide should elaborate on advisability of common procurement vocabulary that would identify goods, construction or services by codes or by reference to general market-defined standards (that is, standardized products). Developing lists with goods, construction or services that were not suitable for ERAs or a list that would describe characteristics of goods, construction or services, which if present would make such goods, construction or services suitable for ERAs were also suggested (as opposed to developing a positive list that would be difficult to update). Reference in this regard was made to paragraph 35 of A/CN.9/WG.I/WP.43.

103. With respect to the term "standardized", appearing in proposed article 19 bis in A/CN.9/WG.I/WP.43 and not reflected in the proposed article 36 bis, the tentative preference expressed was to avoid that term as it was prone to different interpretations and therefore could give rise to review. The term "commonly used" was considered to be aimed at the same objective as "generally available", with the meaning easily and more uniformly comprehensible but both might be retained. It was also agreed that no approval of a third party would be required for ERAs to be used. As the proposed location of the article indicated, the Working Group's understanding was that ERAs would essentially be a part of tendering proceedings, while not excluding the possibility of using it as a stand-alone method or a phase in multi-stage framework agreements.

104. The Secretariat was requested to reconsider the example in paragraph 32 of A/CN.9/WG.I/WP.43 as well as the addition in paragraph 5 of the Guide text proposed for article 19 bis.

3. Procedures in the pre-auction period (A/CN.9/WG.I/WP.43, paras. 38-53)

105. As regards proposed article 47 bis, it was queried whether the article contemplated that suppliers could withdraw from the ERA before its closure. The Working Group heard that there was no express provision in the article, but the implication of the continuing obligation upon the procuring entity to ensure sufficient competition implied that suppliers could indeed withdraw. The Working Group also heard that in some jurisdictions, suppliers were not permitted to withdraw once they had committed to participate in the ERA.

106. It was further noted that there were two distinct types of ERA that could be contemplated: in the first, the full series of steps in an ordinary tendering proceeding would be conducted, including an assessment of the responsiveness of the initial tender and the qualifications of the suppliers, with all the safeguards of the sealed envelope system. Thereafter, all qualified suppliers would be invited to participate in the ERA that would determine the winner. In such a system, it would be possible for suppliers to withdraw, as the pre-ERA assessment ensured that the winner could fulfil the contract.

107. In a second type of ERA, there would be no initial assessment, and no control of the responsiveness of the tender or qualifications of the supplier until after the ERA had closed. The attention of the Working Group was drawn to the existence of ERAs already conducted in this manner, and that these procedures might minimize the risk of fraud in the operation of the ERA, in that sensitive information that would be submitted in an initial tender would not be available prior to the ERA itself. In this system, the suppliers simply confirmed their acceptance of the specifications and that they were qualified to participate in the procurement online as the ERA commenced. It was observed that post-ERA assessment of responsiveness and qualification raised the risk that the winning supplier was then found to be unqualified or its tender non-responsive, in which case another supplier would be awarded the contract (according to defined rules). In this system, since there was no guarantee that the winning supplier could fulfil the contract, it might be unadvisable to permit suppliers to withdraw.

108. The Working Group considered that the Model Law should be sufficiently flexible to enable either system to operate, provided that sufficient safeguards were in place to protect against fraud and abuse. The Working Group requested that proposed article 47 bis be redrafted to confer sufficient flexibility in this regard. As regards the current text, it was agreed that paragraph 2 should provide that where the first type of ERA above was contemplated, suppliers or contractors should, prior to the auction, submit initial tenders that were complete in all respects. It was also agreed that the article should refer to "tenders" rather than "bids", and that a more appropriate term for the parts of the tender that would be subject to the ERA than "elements" would be sought.

109. The Working Group considered that the Guide to Enactment text should explain that the provisions in the Model Law were intended to confer sufficient flexibility to allow an ERA to operate in either of the ways described in paragraphs 106 and 107 above, depending on the circumstances prevailing in the country concerned. In addition, the Guide should address the safeguards that should be in place to allow either system to operate consistently with the objectives and

main procedures of the Model Law, including any differences between ERAs and those main procedures.

110. As regards the possibility of suppliers withdrawing from the ERA and ensuring effective competition, it was agreed that paragraph 3(d) should provide that:

> "The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to ensure effective competition. If the number of suppliers or contractors at any time before the closure of the auction, is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity [may/shall] withdraw the electronic reverse auction."

111. The Working Group agreed to consider at its next session whether the procuring entity should have the option, or be required, to withdraw the ERA in such circumstances, in the light of whether or not suppliers should be permitted to withdraw from the ERA. The Working Group considered that the Guide to Enactment text should address when and how suppliers might withdraw from the ERA process before its closure.

Notes

[1] The representatives of AfDB, COMESA, IADB and WTO briefed the Working Group in this regard. A summary of their work in the field of public procurement is found in A/CN.9/598/Add.1.

[2] General Assembly resolution 60/21.

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Insolvency law: possible future work

Note by the Secretariat

1. At its thirty-eighth session (2005), the Commission had before it a number of proposals (A/CN.9/582 and Add.1-7), on which it heard presentations, for future work in the area of insolvency law, specifically on treatment of corporate groups in insolvency, cross-border insolvency protocols in transnational cases, post-commencement financing in international reorganizations, directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases, and commercial fraud and insolvency.

2. After discussion, some preference for the topics of corporate groups, cross-border protocols and post-commencement financing was expressed.[1] The Commission agreed that to facilitate further consideration and obtain the views and benefit from the expertise of international organizations and insolvency experts, an international colloquium should be held, similar to the UNCITRAL/INSOL International/International Bar Association Global Insolvency Colloquium (Vienna, 4-6 December 2000), which had been a key part of the work on the development of the UNCITRAL Legislative Guide on Insolvency Law (see A/CN.9/495). The Commission agreed that in preparing the programme and determining the priorities for a colloquium, to be held in Vienna from 14 to 16 November 2005, the Secretariat should take into account the discussion of the various topics in the Commission.[2]

3. Approximately 95 participants from 36 countries attended the colloquium, including representatives of Governments and international organizations, such as the OECD and the World Bank, and lawyers, accountants, bankers, judges and insolvency practitioners.

4. Based upon the exchange of views and information that took place amongst participants, the present note provides an evaluation and synthesis of the

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Colloquium proceedings and recommendations for possible future work that might be undertaken by the Commission.

I. Treatment of corporate groups in insolvency

5. The Colloquium heard that the business of corporations is increasingly conducted through the medium of a corporate group. A corporate group may be described loosely as a number of separate entity companies that are linked together by some form of common control or ownership, and they are employed in both domestic and international situations. The reasons for the use and popularity such groups are many and varied, ranging from the need for an "organisational" structure to the need to lessen the incidence of taxation. Other reasons include the need for diversification and risk management, the need to establish operating entities in a foreign jurisdiction, the need to facilitate a merger or takeover, and the need to provide for the requirements of a sophisticated financial structure.

6. Corporate groups might conduct their affairs in such a way that some or all of the members of the group may be jointly liable for the external debts of individual members or subject to group guarantees given in respect of the external liabilities of individual members and may transact business between one another that results in internal debts and liabilities between individual members of the group.

7. The structure of a corporate group may be simple or highly complex, particularly if the group is engaged in international trade. A corporate group will be more complex if it has become involved in joint venture arrangements, special purpose corporate vehicles ('SPV'), offshore trusts and partnerships and the like. If this complexity is disturbed by the onset of financial difficulty affecting one or more of the members of a group, problems arise simply because the group is constituted by members that each have a separate legal personality and existence. Absent legislative or judicial intervention, that situation requires that each entity be separately considered and, if necessary, separately administered in insolvency.

8. Considerations relevant to facilitating an understanding of how corporate groups work in practice were identified as including: the accounting treatment of corporate groups; the corporate regulatory requirements concerning corporate groups; the fiscal or taxation motives behind the development of a corporate group; and the sophistication of finance and lending techniques that are employed in relation to groups. Further considerations, relevant to the present treatment of corporate groups in insolvency in a variety of jurisdictions, would include: describing what is meant by a "corporate group" (or similar term); the circumstances under which a case could be commenced in respect of two or more members of a group; and the formal remedies or relief that might be available in respect of insolvent or near insolvent members of a group, for example, procedural consolidation, substantive consolidation, extension of liability, reorganisation involving more than one debtor and miscellaneous remedies (such as dealing with inter-group debts and liabilities, and the application of subordination principles).

9. The Colloquium noted that the topic raised questions of the treatment of corporate groups in insolvency both domestically and internationally in a cross-border context. The view was widely shared that addressing the issue in a cross-border context would be difficult without first considering domestic issues and

achieving a common understanding. The view was also shared that if future work were to be undertaken, care should be taken to ensure that it did not interfere with the high incidence and increasing sophistication of corporate group structures, nor interfere in or create uncertainty with respect to commercial transactions that were entered into with corporate groups (often regardless of the absence or presence of legislation directed at the possible insolvency of or within a group) and also avoid the prospect or possibility of propelling corporate groups toward sanctuary in some foreign "safe haven".

10. The Colloquium heard how different aspects of an insolvency regime were applied to corporate groups in different countries and considered whether provisions might be required to address issues particular to those corporate groups. That discussion identified a number of issues relevant to the treatment of corporate groups, including the following.

(a) In a domestic setting

11. It was noted that because the use and meaning of key terms (e.g. corporate group, control, parent corporation, subsidiary corporation, holding corporation, related or associated corporation) differed between countries, definitions would need to be considered to ensure that a common understanding of the subject matter could be reached. That consideration could also include the extent to which entities other than corporate group members (such as Special Purpose Vehicles, joint ventures, offshore trusts and partnerships and other similar devices) should or may be treated as part of a corporate group.

12. Commencement of insolvency proceedings against a corporate group was discussed and a number of different questions noted, including the applicable test; how that test would be applied to a corporate group (whether to each member of a corporate group or to the group as a whole); whether an application for commencement may be made in respect of more than one debtor; whether a parent (or other member) of a group may apply in respect of every member of the group, including itself); who could apply for commencement (including, for example, commencement by a regulatory body such as a securities or corporate regulatory agency); and how liabilities such as inter-company indebtedness and cross-guarantee liabilities would be treated.

13. Other issues concerning commencement included: the powers (for example, procedural consolidation) that might be given to a court at the time of commencement in respect of some or all of the members of a corporate group; whether the same administrator could be appointed in respect of each group member; how issues of potential conflict (for example, because of cross-guarantees between members of a group, inter-group debts, wrongdoing in respect of one member by another) should be addressed; whether legislation specific to corporate groups might be required in the case of insolvency laws that permitted management to remain in office in insolvency proceedings; and whether special provisions were required with respect to application of a stay or suspension in the case of a corporate group or in respect of post-commencement finance for a corporate group (or two or more of its members).

14. Possible reorganization of a corporate group or members of a corporate group also raised a number of issues including: whether two or more members of a

corporate group could be reorganized through a single reorganisation plan and if so, what special provisions might be required, for example, with respect to the nature and content of a plan; safeguards; convening and conducting creditors meetings in respect of a plan; treatment of creditor claims; voting of creditors; and approval of a plan.

15. Issues relating specifically to corporate groups in insolvency concerned the possible liability of one member of a corporate group (for example, the parent) for the debts and liabilities of an insolvent member of the group and the different approaches that might be taken, including imposing strict liability for all the debts and liabilities of a member of a group, regardless of the circumstances in which they were incurred; imposing liability arising from acquiescence in permitting or directing a member of a group to incur debts when it was or was likely to become insolvent; imposing liability with respect to the conduct of the affairs of the group in such a way that some classes of creditors might be prejudiced (for example, liability to employees of the member); or imposing liability where valid grounds exist for reaching the assets of another member of a corporate group.

16. A further issue of particular relevance to corporate groups and their treatment in insolvency was that of consolidation and whether a domestic insolvency law should provide for consolidating or combining the affairs of two or more members of a group so that there was one pool of assets and one pool of creditors, and the circumstances in which an order for such consolidation might be made.

(b) In an international setting

17. Participants noted the importance of the UNCITRAL Model Law on Cross-Border Insolvency to reorganization of corporate groups in cross-border insolvency cases, in particular the provisions dealing with coordination and cooperation. However, it was also noted that the Model Law did not specifically address a number of other issues relevant to cross-border insolvency of corporate groups, including: how commencement of proceedings could be addressed where the parent or the majority of members of a group were incorporated in one jurisdiction, but other members were incorporated in another jurisdiction or jurisdictions; whether "centre of main interests" in respect of a corporate group and its members needed to be defined in the light of interpretation of that concept in recent cross-border insolvency cases; and the special provisions that might be necessary to ensure the availability of post-commencement finance that involved a corporate group with members in more than one jurisdiction and to foster cooperation between jurisdictions in the case of an international corporate group insolvency. Attention was drawn to the difficulty of reorganizing a corporate group without substantial coordination in a cross-border insolvency case. A further issue was how harmonisation and coordination of international and regional responses to corporate groups and insolvency could be encouraged.

18. On the basis of the discussion at the colloquium, it may be concluded that corporate groups are an increasingly important vehicle for world trade and that the problems being encountered with respect to insolvency of one or more members of corporate groups, both domestically and in an international context, would support further work being undertaken by the Commission. That work might take the form of a text that would provide possible legislative guidance to States wishing to

address issues specific to the treatment of corporate groups in both domestic and cross-border insolvency.

II. Post-commencement financing

19. The colloquium discussed the importance of post-commencement financing to the success or failure of reorganization, particularly with respect to ensuring that the debtor's business could be continued and payments for critical goods and services, supplies, wages, insurance and rent made. Participants noted that there was an emerging consensus on the need to provide statutory authority for the provision of post-commencement finance, as reflected in the treatment of that topic in recent international work on insolvency, including by the International Monetary Fund, the Asian Development Bank, the World Bank, and most recently in the UNCITRAL Legislative Guide on Insolvency Law, which included a chapter of commentary and recommendations on the topic.

20. Participants discussed some of the structural impediments that existed with respect to obtaining such financing in domestic insolvency cases. These included: lack of statutory authority; personal liability of an insolvency representative or directors and officers of the debtor for incurring the debt that such financing would entail; application of avoidance provisions; problems associated with providing priority to post-commencement finance; and a preference for liquidation over reorganization that made the issue of such finance difficult to address. It was noted that only a handful of insolvency laws authorized post-commencement financing and even fewer provided any type of priority for the repayment of such finance. A note of caution was sounded with respect to the relevance of a regime to facilitate post-commencement finance in developing countries where the necessary types of finance might not available.

21. Participants heard about recent national legislative developments with respect to some of these issues and noted that changes were being effected, although slowly.

22. A number of cross-border insolvency cases were discussed and the difficulties with respect to financing, particularly where corporate groups were involved, were evident. Differences existed with respect to the priority accorded to post-commencement finance in different jurisdictions, as well as with respect to providing security for post-commencement finance. There were questions of applicable law, and of whether post-commencement finance obtained by a debtor could be used by another member of the same corporate group and whether non-debtor members of a corporate group could borrow money post-commencement and permit the debtor to use those funds. Participants underlined the need to provide certainty and predictability for lenders in those situations.

23. Based on the discussion, it may be concluded that while the UNCITRAL Legislative Guide on Insolvency Law addresses some of the issues identified, particularly with respect to authorisation, the issue of post-commencement financing in cross-border insolvency of corporate groups could be further considered, building upon the work in the Legislative Guide, as well as upon the work of UNCITRAL in cross-border insolvency. Initially, that work could form an important component of work that might be undertaken with respect to treatment of

corporate groups in insolvency; any additional aspects of the topic could be considered when that work is completed.

III. Cross-border insolvency protocols and court-to-court communication

24. The colloquium heard reports on instruments that had been developed to facilitate the conduct of cross-border insolvency cases, in particular the IBA Concordat and the American Law Institute/International Insolvency Institute Court-to-Court Communication Guidelines and on the status of adoption of the UNCITRAL Model Law on Cross-Border Insolvency. It was emphasized that the Model Law provides the legislative framework for cooperation and coordination in cross-border insolvency cases and the authority, in article 27(d), for the approval or implementation by courts of agreements concerning the coordination of proceedings. A number of cross-border cases involving the use of such agreement or protocols were presented, with particular attention being paid to the types of issues typically covered; how such protocols could facilitate court-to-court communication and cooperation; and the difficulties that had been encountered with the negotiation and use of protocols. Cases where such protocols were not used, but would have facilitated conduct of the case were also discussed, and examples given of why such tools were not always available. It was noted that language problems could be encountered where protocols were being negotiated between countries from different language groups and that the availability of information on cross-border cases and developments in practice, particularly with respect to coordination and cooperation, was essential to facilitate the development that practice, especially in countries that had not had cross-border cases and therefore had not had occasion to use such protocols.

25. It should be noted that appropriate statutory authorization, such as adoption of the UNCITRAL Model Law and in particular, articles 25-27, is required in order to encourage and facilitate cooperation in cross-border insolvency cases and, in particular, to facilitate the use of cross-border protocols. However, while the Model Law provides that fundamental authorization, it does not provide detail, other than in article 27 and some further discussion in the Guide to Enactment, on the practicalities of how that cooperation could be implemented.

26. On the basis of the discussion, it could be concluded that existing legal and judicial experience with respect to the negotiation, use and content of protocols could usefully be made available in some form to the international legal community. The availability of that experience would build upon, complement and provide further impetus for the enactment of the legislative framework provided by the Model Law, facilitating implementation of the coordination and cooperation authorized by articles 25-27 and the development and use of protocols. Issues to be addressed in that work could include: facilitating and guiding communications among courts (e.g. notice to parties, participation by parties and disclosure of substantive issues to parties) and standards for the substance of a protocol (e.g. control and protection of assets, coordinating disposition of assets, post-commencement finance, priority of claims, filing and classification of claims, distribution to creditors and effecting reorganization). Examples of protocols that had been negotiated could also be made more widely available.

IV. Directors' and officers' responsibilities in insolvency and pre-insolvency

27. The colloquium heard that an increasing number of widely publicized insolvency cases were focussing on issues related to director and officer responsibilities and liabilities and the outcomes of those cases pointed to the lack of certainty and predictability in this area. Reports from international organizations on their work in this area highlighted some of the issues and problems encountered. To date, that work had focussed on providing guidance on issues arising in the context of insolvency, rather than on establishing prescriptive rules. Diversity of national approaches to relevant issues and the complexity of those issues, particularly when considering appropriate responses to different types of companies (e.g. small and medium enterprises as opposed to multinational enterprises), as well as the relevance of law other than insolvency law and the importance of social policy, were amongst the reasons for the adoption of that approach. It was pointed out, for example, that while small and medium enterprises typically were characterized by a family relationship between the owner, directors and management, often involving personal guarantees of financial obligations, that characterization was not true for large public enterprises. Accordingly, the abilities and motivations of directors in various types of enterprise structure would differ, as would the economic factors driving the enterprises, particularly as between different types of markets and economies, making a universal, rule-based approach to issues of responsibility and liability hard to achieve. It was noted that national legislation addressing relevant issues was framed in a domestic context around various social policy issues that would also need to be factored into any discussion of a possible unified approach. It was also noted that the topic raised certain issues that were still controversial in a number of countries and international forums, in particular the extent to which directors should be responsible and accountable to creditors, in addition to shareholders.

28. Based on the discussion, it could be concluded that while guidance might be useful in this area to assist both debtors and creditors with determining what constituted acceptable or unacceptable behaviour in proximity to insolvency, certain issues that might need to be addressed in providing such guidance remain controversial and there are concerns about the maturity of the topic for developing that guidance at this time.

V. Insolvency and commercial fraud

29. The colloquium heard a report on work currently being undertaken by UNCITRAL with respect to identifying the common features of fraudulent schemes, including in the context of insolvency, and on UNCITRAL's participation in a study being undertaken by the United Nations Office of Drugs and Crime (UNODC) on fraud and criminal misuse and falsification of identity, including a component on commercial fraud.

30. It was observed that both of those projects focussed on issues of commercial fraud broadly, particularly on identifying what constituted fraud, detecting its

occurrence and combating fraud, and did not address the aftermath of fraud and its impact in insolvency on the employees, creditors and other parties in interest.

31. The Colloquium heard suggestions for specific considerations in the insolvency context, including the allowance and ranking of penalties; minimization of interference by the criminal authorities with the reorganization process; the classification of claims by defrauded investors; the treatment of claims of creditors assisting in a fraud; treatment of intercompany claims between members of a multinational corporate group when fraud is committed by a debtor that becomes subject to an insolvency proceeding; the rights of an estate administrator to recover assets in connection with commercially fraudulent activities; and the forfeiture of assets of insolvent companies.

32. It was noted that the UNCITRAL Legislative Guide on Insolvency Law did not directly address issues relating to fraud in the context of insolvency, except briefly in the context of subordination of claims and the treatment of penalties and fines, although Working Group V had discussed the question during development of the Legislative Guide. The colloquium acknowledged the relevance of questions of fraud to the administration and outcome of insolvency proceedings. It was noted, however, that the issues identified concerned not only legislative approaches to the treatment of issues of fraud in the insolvency context (whether occurring before or during insolvency and whether addressed in the insolvency law or some other law), but also the activities of regulatory authorities that might impact upon the administration of insolvency.

33. On the basis of the discussion, it could be concluded that the work already being undertaken by UNODC on fraud, including commercial fraud, and by UNCITRAL with respect to commercial fraud, should be reviewed to determine the extent to which issues related to fraud in insolvency matters were to be addressed or could be addressed in that context, before considering possible future work on that topic.

VI. Proposal for future work

34. The Secretariat proposes that:

(a) The treatment of corporate groups in insolvency is now sufficiently developed for the topic to be referred to a working group for consideration. A meeting of Working Group V (Insolvency Law) has tentatively been scheduled for 11-15 December 2006 in Vienna;

(b) Post-commencement financing should initially be considered as a component of work to be undertaken on insolvency of corporate groups; the working group could also consider any proposals for work on additional aspects of this topic;

(c) The topic of cross-border protocols could be put on the agenda of a working group, but the initial work of compiling practical experience with respect to negotiating and using cross-border insolvency protocols could be developed through consultation with judges and insolvency practitioners. A preliminary progress report on that work could be presented to the Commission for further consideration at its next session; and

(d) Work being undertaken by other organizations in relation to the topics of directors' and officers' responsibilities in insolvency and pre-insolvency, and insolvency and commercial fraud should be monitored to facilitate consideration, at some future date, of work that might be undertaken by the Commission.

Notes

[1] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 210

[2] Ibid.

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Insolvency Law

Developments in insolvency law: adoption and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency and developments in interpretation of "centre of main interests" in the European Union

Note by the Secretariat

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I. Introduction

1. This note reports on developments occurring since document A/CN.9/580 of 15 April 2005 in the area of cross-border insolvency law, including with respect to the adoption and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency and interpretation of the term "centre of main interests" in cases in the European Union under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (ECR).

2. The cases interpreting provisions of the ECR are included in this paper as they may prove to be of assistance to interpretation of analogous provisions of the Model Law. The jurisprudence in the EU remains somewhat unsettled with respect to, for example, interpretation of the term "centre of main interests" and the Commission may wish to ask the secretariat to continue monitoring the decisions of courts of the European Union with a view to facilitating interpretation of the Model Law.

II. Developments in cross-border insolvency

(a) Adoption of the UNCITRAL Model Law on Cross-Border Insolvency

3. Legislation based on the Model Law has now been adopted by Eritrea; Mexico;[1] Serbia and Montenegro (both jurisdictions[2]); Japan;[3] South Africa;[4] Romania;[5] Poland;[6] the British Virgin Islands;[7] the United States of America[8] and the United Kingdom of Great Britain and Northern Ireland.[9] In 2000, the United Kingdom enacted legislation enabling the Model Law to be implemented by regulation. Those regulations, the Cross-Border Insolvency Regulations, came into effect on 4 April 2006 (the regulations do not apply in Northern Ireland). A number of countries have draft legislation based upon the Model Law under consideration, including Argentina and Pakistan, while other countries have recommended adoption of such legislation, including Australia, New Zealand and Canada. The Spanish Insolvency Act 22/2003, which came into force in 2004, includes international insolvency provisions inspired by the Model Law, as well as provisions based on the ECR.

(b) Developments in interpretation of the Model Law

4. The following is a brief summary of recent decisions under Chapter 15 of the United States Bankruptcy Code, which implements the UNCITRAL Model Law on Cross-Border Insolvency and entered into force on 17 October 2005. Those cases are included in this paper to provide information on implementation and interpretation of the Model Law in jurisdictions where it has been adopted. It is expected that these cases will also be included in UNCITRAL's Case Law on UNCITRAL texts (CLOUT) system.

5. *Ian Thow* (United States, 2005).[10] Ian Thow officially filed the first petition under Chapter 15 of the United States Bankruptcy Code ("Chapter 15 petition") in the Seattle, Washington, on 2 November 2005, seeking recognition in the United States of a foreign main proceeding pending in British Columbia, Canada. The United States court recognized the proceedings in British Columbia as foreign main proceedings on the basis that virtually all of the debtor's assets and creditors were

located in British Columbia, which was therefore his centre of main interests. The court made orders under section 1521 of the Bankruptcy Code that (a) continuation and commencement of individual actions concerning the debtor's assets and execution against the debtor's assets were stayed; (b) the right to transfer or encumber or otherwise dispose of the debtor's assets in the United States was suspended; (c) the debtor should make himself and pertinent records available for inspection and examination by the Canadian trustee; (d) the debtor's assets in the United States that would be property of the debtor's estate under the Bankruptcy Code should be administered by the Canadian trustee; and (e) the debtor should cooperate with the Canadian trustee with respect to its rights and duties under the order. The court reserved its decision on choice of law issues relating to the assets comprising the debtor's estate.

6. *TriGem Computer Inc.* (United States, December 2005).[11] After experiencing financial difficulties, TriGem, one of the world's largest makers of computers, became the subject of a reorganization case under South Korean law. Since TriGem also had creditors in the United States, the Receiver appointed for TriGem in the Korean reorganization proceedings filed a Chapter 15 petition on behalf of TriGem, principally to have the automatic stay enjoin litigation that was pending against TriGem in the United States. On 7 December 2005, the United States court recognized the Korean reorganization proceeding filed by TriGem's corporate parent as a "foreign main proceeding" under Chapter 15 and enjoined creditors from proceeding against TriGem's United States assets. The evidence presented to the court that the Republic of Korea was TriGem's centre of the main interests consisted of the sworn statement of the foreign representative to the effect that TriGem's head office, branch offices and business, research and training centres were all located in various parts of the Republic of Korea.

7. *La Mutuelle Du Mans Assurances IARD* (United States, December 2005).[12] The United Kingdom branch, *La Mutuelle Du Mans Assurances IARD* (MMA), of a French insurer was the subject of insolvency proceedings under the Companies Act of 1985 of Great Britain, pursuant to which the court had approved a scheme of arrangement on 28 October 2005. MMA filed a Chapter 15 petition in New York on 11 November 2005 to gain time to make payouts under the approved scheme and to prevent creditors from suing it or attaching its assets in the United States. Having found that the debtor's centre of main interests was in the United Kingdom, not France, the court recognized the foreign proceedings as foreign main proceedings under Chapter 15 and permanently enjoined creditors from moving against MMA's assets. The court made a number of orders concerning conduct of the proceedings, including that "[t]he scheme of arrangement sanctioned by the U.K. High Court in the foreign proceeding shall be given full force and be binding on all persons and entities in the United States."

(c) Developments in interpretation of "centre of main interests" under the ECR

8. The following brief summary reflects a selection of decisions on interpretation in the EU of the term "centre of main interests". The Model Law does not define the term "centre of main interests", but article 16 (3) contains a rebuttable presumption that it will be the debtor's registered office or, in the case of an individual, its habitual residence. Article 3 (1) of the ECR contains a similar presumption regarding the registered office and Recital 13 indicates that the centre of main

interests is the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.[13]

9. *Shierson v. Vlieland-Boddy* (United Kingdom, July 2005).[14] This case clarified the point at which a debtor's centre of main interests is to be determined. The court of first instance decided that the time for consideration of the centre of main interests was the time of the decision to open proceedings. On appeal, however, the Court of Appeal held that the relevant time was when the court was first required to decide whether to open insolvency proceedings. The key date should therefore be the time of the first hearing of the bankruptcy petition or, where there has been an application for permission to serve the petition outside the jurisdiction or for interim relief in advance of the hearing of the bankruptcy petition, the hearing of that application. The Court also held that if a debtor moved to another EU country deliberately trying to avoid insolvency proceedings by altering its centre of main interests, there was nothing to prevent this, provided that the Court was satisfied that any such relocation by the debtor was based on substance and had the necessary element of permanence.

10. *Re TXU Europe German Finance BV* (United Kingdom, October 2004).[15] This case addressed whether it is possible to place companies incorporated in other parts of the EU into creditors' voluntary liquidation in the United Kingdom. Notwithstanding the wording of section 73 (1) of the Insolvency Act 1986 and section 735 (1) of the Companies Act 1985 (which suggest that a foreign company cannot be wound up voluntarily), the court, following the case of *Re BRAC Rent-A-Car International Inc.*, held that under the ECR it is possible for a foreign company to be wound up voluntarily when its centre of main interests is in the United Kingdom, provided the company has the capacity under its domestic law to pass the relevant resolution. In this case, the court accepted foreign legal advice that such a resolution could be passed under the law of Ireland and the Netherlands, the relevant places of incorporation.

11. *Aircraft* (Czech Republic, April 2005).[16] This case involved conflicting decisions by different courts in two Member States, both opening main proceedings. A creditor applied to open insolvency proceedings at the Prague Regional Court (Czech Republic). Pending that court's decision, the debtor applied for insolvency proceedings at the Regional Court of Hamburg (Germany), asserting that his centre of main interests was in Hamburg. Before the Regional Court of Hamburg issued its decision, the Prague Regional Court appointed a provisional administrator. After the Regional Court of Hamburg issued a decision opening a main proceeding, the Prague Regional Court also issued a decision opening a main proceeding, on the ground that the centre of main interests of the debtor was situated in the Czech Republic: the debtor's private domicile was in the Czech Republic and he conducted professional activities in the tourism sector almost every day by recommending his products to travel agencies in the local newspapers. The Prague Regional Court stated that in order to establish which proceedings had priority, the moment to consider was the date of the first decision issued on the case. Since it had issued two decisions (one ordering the debtor to express his opinion on the creditor's application, and one appointing a provisional trustee) prior to the decision of the German court opening proceedings, the Prague court took the view that the German proceedings were to be considered secondary proceedings. The debtor has appealed

against the decision of the Prague court and the creditor against the decision of the Hamburg court.

12. *Silvalux Sarl* (Luxembourg, April 2004).[17] This case involved the determination of the centre of main interests of a company, registered in France with a subsidiary in Luxembourg. The court found that the centre of main interests of the company was in Luxembourg, on the grounds that registered mail sent to the head office in France was returned with the notation that the addressee did not reside at the address indicated and the employees of the company were registered with the social security authority in Luxembourg.

13. *UK Rover Group* (United Kingdom, May 2005).[18] The High Court found it had jurisdiction to make administrative orders in relation to the affairs of 8 national wholly owned sales subsidiaries of the English company MG Rover Overseas Holding Ltd, which had their places of incorporation in different EU countries. The court based its decision on the following findings of fact. Firstly, the management of the national sales companies invariably included at least one director resident in the United Kingdom, and no other nationalities were common to the boards of the national sales companies. In addition, five of the national sales companies had a board with a majority of United Kingdom residents and the staff structure was such that all senior staff of the national sales companies were appointed by direct specific authorization from the international headquarters in the United Kingdom. Secondly, as to the financial structure, each of the national sales companies operated under an annual budget submitted and approved by the headquarters in the United Kingdom; the headquarters played the key role in budget setting, financial scrutiny and funding; and no national sales company could describe itself as having autonomy. Thirdly, in terms of trading, the evidence clearly established that no national sales company had an autonomous and independent existence. Finally, the general overview was that the national sales companies clearly together formed a subsidiary network within part of an international group structure.

14. *AvCraft* (Germany, June 2005).[19] The factories of AvCraft Aerospace GmbH, the German subsidiary of AvCraft Aviation of Leesburg, Va., were situated in Oberpfaffenhofen (Germany). The German court found that the debtor's centre of main interests was in Oberpfaffenhofen as that was where the raw materials were delivered and where the legal and economic network, in particular with respect to suppliers, was promoted and developed. All the relevant entrepreneurial activities, such as purchases, management of personnel, accounting and the overall key business were also carried out there. The court rejected the presumption in the ECR that the place of registration of the debtor, in this case Dublin, would be its centre of main interests.

15. *Hukla* (Germany, August 2004).[20] The court found that the centre of main interests of the debtor (an Austrian marketing company) was in Germany, notwithstanding that its place of registration was Vienna. The Austrian company had to be considered a commercial unit of the German company, as it lacked economic independence and its move to Austria some years before the opening of the insolvency proceedings was for tax reasons and reasons related to retail-trade facilities. In reaching this conclusion, the Court took into account several factors: the management of the mother company, situated in Germany, provided strategic and operational guidance for the activities of the Austrian subsidiary; the budget of the Austrian company was regularly submitted to the management of the German

company for approval; the organization and supervision of the marketing activity carried out by the sales representatives of the Austrian company took place in German; and most relevant commercial books and documents were kept in Germany.

16. *Collins & Aikman* (United Kingdom, July 2005).[21] The English court considered an application for administration orders in respect of 24 companies of the *Collins & Aikman Corporation Group* (whose headquarters was in the United States of America), incorporated in different EU countries. It found that, according to article 3, abs. 1 (the presumption as to centre of main interests) of the ECR, it had jurisdiction over all of the companies on the grounds that: the manager entrusted with coordinating all cash management functions for the European companies was based in England; all cash co-ordination functions, principally concerning payment approval of daily cash calls made by individual plants, were based in England; the pooling bank accounts for the EU operations were held with a bank in London; human resources for Europe were coordinated from England; information systems for Europe were run from England; the engineering design for Europe was based in England; the majority of the sales functions in relation to the European operations were dealt with from England; and the strategic decision making in relation to the European operations had been largely undertaken by a committee based in England and consisting of majority of United Kingdom executives.

17. *Dental Technician* (Germany, April 2005).[22] The German court stated that, in order to avoid legal uncertainty, the time for consideration of the centre of main interests was the time of the submission of the petition, and not the time when the debts were incurred. The court left open the questions of whether the time for assessing the centre of main interests could be when the decision opening the proceedings was made and of which judge was competent in the event the debtor had moved its centre of main interests after the submission of the petition, but before the decision was made. As to the criteria for determining the debtor's centre of main interests, the court observed that, as far as an employee was concerned, the domicile or place of habitual residence was relevant. In the case at hand, both the domicile and the place of habitual residence of the debtor were in England; the debtor carried out his professional activity as a dental technician in England and had shown no intention of going back to Germany; by the time of the submission of the petition, he had already taken steps to finalise his professional and personal affairs in Germany; he had a valid address in England and conducted his business correspondence from there; and he administered personal assets located in Germany from England.

Notes

[1] Ley de Concursos Mercantiles, D.O. 12 de Mayo de 2000 (Mex.).

[2] Serbia: Law on Bankruptcy Proceedings 2004, Part XII International Bankruptcy; Montenegro: Law on Business Organization Insolvency, February 2002.

[3] Law relating to Recognition and Assistance for Foreign Insolvency Proceedings (Law No. 129 of 2000).

[4] Cross-Border Insolvency Act, 42 (2000), art. 34 (S. Afr.).

[5] Law No. 637 of 7 December 2002 on Regulating Private International Law Relations in the Field of Insolvency.

[6] Law on Insolvency and Restructuring of 28 February 2003.
[7] Insolvency Act, 2003. The Act, which came into force in August 2004, includes provisions on cross-border insolvency (Part XVIII); this Part has not yet entered into force. Part XIX Orders in Aid of Foreign Proceedings, which has entered into force, allows applications from foreign representatives for various types of relief to aid the foreign proceedings and specifies the matters to be taken into account by the court in ordering that relief. This Part includes provisions similar to those included in articles 5, 7 and 10 of the Model Law.
[8] United States Bankruptcy Code, chapter 15.
[9] Insolvency Act 2000.
[10] U.S. Bankruptcy Court for the Western District of Washington (unpublished order).
[11] U.S. Bankruptcy Court for the Central District of California, case no. 2:05-bk-50052-tD, December 7 2005 (unpublished order).
[12] U.S. Bankruptcy Court for the Southern District of New York (Judge Burton R. Lifland), 7 December 2005.
[13] For further information on these and other relevant cases see www.eir-database.com.
[14] Court of Appeal, Civil Division, 28 July 2005; [2005] EWCA Civ. 974.
[15] [2005] BPIR 209.
[16] Prague Regional Court, 26 April 2005, 78 K 6/05-127.
[17] Tribunal de Luxembourg, 15 April 2005 (II No. 365/05).
[18] High Court of Justice, Chancery Division, 11 May 2005.
[19] AG Weilheim i.OB, 22 June 2005 (IN 260/05).
[20] Offenburg District Court, 2 August 2004.
[21] High Court of Justice, 15 July 2005, [2005] EWHC 1754 (Ch).
[22] AG Celle, 18 April 2005 (29 IN 11/05).